BLANK
PAGE

BLANK
PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 438

ANDREWS VAN LINES, INC., AND SECURITY VAN LINES, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellants to set aside an order of the Interstate

Commerce Commission.[1] The order denied appellants' applications for certificates of public convenience and necessity to continue to operate as common carriers by motor vehicle between the contiguous United States and the State of Alaska under the Alaska "grandfather" statute, 74 Stat. 382, 49 U.S.C. 306(a)(4).[2]

Prior to August 26, 1958, the critical date for establishing grandfather rights under the statute, the appellants were engaged in the transportation of household goods in the Alaska trade through the regular use of several independent transportation agencies. Appellants transported nearly all these household goods by truck to Seattle, Washington, where they turned over the shipment to a local agent or to the Alaska Steamship Company for repacking into a special container called a "sea-van." The "sea-vans" were then placed aboard a vessel of the Alaska Steamship Company, which is not affiliated with appellants, and taken to an Alaskan port. At the Alaskan port either an Alaskan trucking concern met the shipment and carried it to its final destination, or the shipment was placed aboard the Alaska Railroad for shipment to the interior. At infrequent intervals, the movement from Seattle to Alaska was by air, utilizing one of the independent air lines and an Alaskan trucking concern (J.S. 26, 42-43). Only rarely did appellants transport household goods to Alaska overland via the

---

[1] The district court's opinion is reported at 240 F. Supp. 763.

[2] "Contiguous United States" refers to the continental United States south of the Canadian border.

Alaska Highway; appellant Andrews made no such shipments prior to the critical date of August 26, 1958, and appellant Security, only a few (J.S. 33).

The Alaskan trucking concern which performed service for the appellants was not their exclusive agent but commonly provided similar service for most of the nationwide household goods carriers (J.S. 46), and the Alaskan concern controlled its own operations (J.S. 48).

The appellants filed applications with the Commission for certificates under the Alaska "grandfather" statute (Section 206(a)(4) of the Interstate Commerce Act) to transport household goods between points in the contiguous United States and points in Alaska (J.S. 38). After a hearing, the Commission, adopting the examiners' report (J.S. 59-62), pointed out that under Section 206(a) it may authorize only operations by motor vehicle; and it held that appellants' operations by water, rail, and air are not transportation by motor vehicle and, therefore, cannot be certificated (J.S. 42). It further ruled that appellants' operations by motor vehicle prior to the critical statutory date of August 26, 1958, were not sufficient to warrant a certificate for either contiguous United States-Alaska operations or intra-Alaska operations (J.S. 44-48). The Commission accordingly denied the appellants' applications in their entirety (J.S. 49, 62).

A three-judge district court affirmed. Although agreeing with the appellants that Section 206(a)(4) was to be liberally construed, the court ruled that "the liberal construction of the statute intended by

Congress was aimed at the substantiality of the operations and not the mode of transportation. * * * The statute expressly and impliedly refers to motor vehicles." (J.S. 30.) The court noted that, under Section 303(e)(3) of the Interstate Commerce Act (49 U.S.C. 903(e)(3)), the appellants' operations, insofar as they constituted truck-ship carriage, were subject to the jurisdiction of the Federal Maritime Commission rather than that of the Interstate Commerce Commission (App. 30). The court also found that substantial evidence supports the Commission's findings that the appellants' overland motor vehicle shipments prior to the critical date were not sufficient to satisfy the requirements for a grandfather certificate (J.S. 33-34).

ARGUMENT

The decision below is correct and this appeal presents no question warranting plenary review by this Court.

1. The statute requires that, in order to qualify for grandfather authority, the transportation that the carrier performed on the critical date must have been entirely by motor vehicle, and cannot have been a combination of motor vehicle and ship, plane or rail carriage. Section 206(a)(4) provides that "any common carrier by motor vehicle * * * [which] was engaged in the transportation of * * * property as a common carrier by motor vehicle between places in the United States and places in Alaska" on August 26, 1958, is entitled to grandfather rights. Section 203

(a)(14) of the Act, 49 U.S.C. 303(a)(14), defines "common carrier by motor vehicle" as "any person which holds itself out * * * to engage in * * * transportation by motor vehicle," and Section 203(a)(13), 49 U.S.C. 303(a)(13), defines a motor vehicle as "* * * any vehicle, machine, tractor, trailer, or semi-trailer * * * used upon the highways." Plainly the statute did not intend to treat carriage by ship, plane or train as carriage by motor vehicle.

The legislative history of the Act confirms this conclusion. Congress, with full awareness of the problem of carriers who used a combination of truck and ship carriage, rejected a proposal which would have subjected them to the jurisdiction of the Interstate Commerce Commission as freight forwarders, and instead chose to leave them under the jurisdiction of the Federal Maritime Commission as non-vessel common carriers by water. 49 U.S.C. 903(e).[3] While the legislative history does show that Congress intended the Alaska grandfather clause to be liberally construed, this was only with respect to how substantial a service the carrier had to have performed on the critical date in order to obtain a certificate, and not with respect to the mode of transportation that would create grandfather rights. Thus, the Senate and House committee reports pointed out that the bill was "liberal as to routes used, points served, etc." S. Rep. 399, 86th Cong., 1st Sess., 3; H. Rep. 1914, 86th Cong., 2d Sess., 6. But nothing in the legislative

---

[3] See S. Rep. 399, 86th Cong., 1st Sess., 5; H. Rep. 1914, 86th Cong., 2d Sess., 5; and see *Bernhard Ulmann Co., Inc.* v. *Porto Rican Express Co.*, 3 F.M.B. 771.

history indicates that Congress intended to create grandfather rights covering motor vehicle operations based upon carriage by other modes of transportation.

Putting to one side the occasional overland shipments upon which appellants do not rely on this aspect of the case (see *supra*, pp. 2-3), the only truck transportation that appellants performed before the critical date was between other points in the United States and Seattle; neither appellant therefore was "engaged in the transportation of * * * property * * * by motor vehicle between places in the United States and places in Alaska" within the meaning of Section 206(a)(4).

2. Contrary to appellants' contention (J.S. 17-19), the Commission's decision in this case is not inconsistent with its decisions in *Reliable Transfer and Storage* (affirmed *sub nom. Lindstrom Extension—Southeast Alaska*, 98 M.C.C. 647); *Hepp and Chapados Alaska "Grandfather" Application*, 94 M.C.C. 475; and *Alaska Van & Storage Co., Inc.,—"Grandfather" Application*, 94 M.C.C. 381. Although in those cases the shipments had moved by water between Seattle and Alaska, the applicants were seeking grandfather rights only for transportation within the State of Alaska itself (under Section 206(a)(5), 49 U.S.C. 306(a)(5)), and the prior water movement was irrelevant to the question whether they had conducted motor carrier operations within that State. Moreover, as the Commission pointed out in the *Reliable Transfer* case, the water carriage within Alaska there involved was not analogous to the water carriage be-

tween Seattle and Alaska involved here (98 M.C.C. 653).[4]

[4] As the district court noted, "[In *Reliable*] the water movement was the only mode of transportation because of the Alaskan terrain, the trucks themselves were transported rather than containers for the goods, the shipper never took control of nor responsibility for the goods [the movement was between points in Alaska rather than between Alaska and the contiguous 48 states], and the trip was mostly on inland water." (J.S. 33)

Appellants also attack the court's ruling that there was substantial evidence to support the Commission's determination that Security Van Lines, Inc.'s overland shipments through Canada were not sufficiently continuous to meet the requirements of the "grandfather clause." This issue, however, is not encompassed within the "Questions Presented" (J.S. 3). In any event, the issue of the substantiality of the evidence supporting the Commission's determination does not warrant further plenary review. See *Loring* v. *United States*, 32 F. Supp. 464 (W.D. Okla.), affirmed, 310 U.S. 609.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

ROBERT B. HUMMEL,
GERALD KADISH,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

THOMAS H. PLOSS,
Attorney,
Interstate Commerce Commission.

SEPTEMBER 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 786746 180

END